

In The

Supreme Court of the United States

October Term, 1977

Supreme Court, U. S.
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No. **77-1206**

JOSEPH GAMBINO AND CARLO CONTI,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT**

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JOSEPH GAMBINO AND CARLO CONTI,

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THE UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT**

Petitioners Joseph Gambino and Carlo Conti pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, affirming petitioners' convictions and sentences for alleged violations of 18 U.S.C. §§371, 1962(b), 1951 and 894.

OPINIONS BELOW

In the appendix are reprinted the opinion of the Court of Appeals, November 21, 1977, ____F.2d ____, and the order of the Court of Appeals denying petitioners' application for reargument, January 27, 1978.

JURISDICTION

The United States Court of Appeals for the Second Circuit entered its judgment on November 21, 1977 and denied reargument on January 28, 1978. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the government failed to prove the participation of petitioners in the alleged conspiracy.
2. Whether the government may prove a defendant's participation in the conspiracy by innuendo and inference where there is no evidence that one of the defendants adopted or participated in any illegal plan.
3. Whether the reacquisition of petitioners' own waste removal "stops" from Terminal Sanitation can constitute a violation of 18 U.S.C. §1962(b).
4. Whether petitioners can be guilty of "extortion" (as that term is defined by 18 U.S.C. §1951) when the only property "surrendered" by the alleged victims belonged to and constituted a legal right of the petitioners.
5. Whether the court below erred in attributing certain unrelated testimony to an alleged violation of 18 U.S.C. §894.
6. Whether the testimony of a witness who admittedly was unaware of the nature of the relationship between the petitioners and the alleged victims constituted sufficient corroboration of the testimony of the alleged victims when the court below found that without corroboration of the "victims'" testimony, no conviction could be had.

CONSTITUTIONAL AND STATUTORY PROVISIONS

18 U.S.C. §371. Conspiracy to commit offense or to defraud United States

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

18 U.S.C. §894. Collection of extensions of credit by extortionate means

"(a) Whoever knowingly participates in any way, or conspires to do so, in the use of any extortionate means

(1) to collect or attempt to collect any extension of credit, or

(2) to punish any person for the nonrepayment thereof,

shall be fined not more than \$10,000 or imprisoned not more than 20 years, or both.

(b) In any prosecution under this section, for the purpose of showing an implicit threat as a means of collection, evidence may be introduced tending to show that one or more extensions of credit by the creditor were, to the knowledge of the person against whom the implicit threat was alleged to have been made, collected or attempted to be collected by extortionate means or that the nonrepayment thereof was punished by extortionate means.

(c) In any prosecution under this section, if evidence has been introduced tending to show the existence, at the time the extension of credit in question was made, of the circumstances described in section 892(b)(1) or the circumstances described in section 892(b)(2), and direct evidence of the actual belief of the debtor as to the creditor's collection practices is not available, then for the purpose of showing that words or other means of communication, shown to have been employed as a means of collection, in fact carried an express or implicit threat, the court may in its discretion allow evidence to be introduced tending to show the reputation of the defendant in any community of which the person against whom the alleged threat was made was a member at the time of the collection or attempt at collection."

18 U.S.C. §1951. Interference with commerce by threats or violence

"(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so

to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than \$10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section —

(1) The term 'robbery' means the unlawful taking or obtaining of personal property from the person of in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official rights.

(3) The term 'commerce' means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45. 18 U.S.C. §1962(b). It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

STATEMENT OF THE CASE

Facts

In late 1968, petitioners Joseph Gambino and Carlo Conti formed Columbus Leasing Corporation (hereinafter Columbus) with Gambino as President and a 2/3 stockholder, and Conti as Secretary-Treasurer and 1/3 stockholder. The equipment for this corporation was purchased from James Plastina and Columbus continued to do Plastina's waste removal operations under an agreement which terminated in late 1969. At approximately this time, Yellow Bird Carting, Inc. (hereinafter Yellow Bird) was organized with Conti as its president (Tr117).¹

In late 1969 or early 1970 Yellow Bird began picking up refuse from the Riverview Cooperative (hereinafter the Co-op Supermarket), which then was temporarily located in the garage in the then new Co-op City. There was evidence offered by the government and controverted by the defense that this customer was obtained following an incident at the Co-op Supermarket in 1969 during which Conti allegedly assaulted one Louis Mongelli with a lead pipe (Tr2485). Mr. Mongelli was called by the defense and testified that this supermarket wasn't one of his

1. References denoted "Tr" refer to Trial Transcript.

customers (Tr2405) and had received the alleged injuries not from Conti but had sustained them in an industrial accident. Gambino, however, never slapped Mongelli, nor was it ever alleged by the government that he participated in or precipitated this alleged incident.

In order to qualify for a carting license from the City of New York, it is necessary that a private sanitation firm have a sufficient number of customers. A customer in the sanitation industry is known as a "stop." In or about June, 1970, in an attempt to obtain this aforementioned license from New York City, Yellow Bird Carting, Inc. entered into an agreement with Terminal Sanitation, then a partnership operated by Peter Darminio and his brother, Anthony Darminio. However, Yellow Bird was refused a license by the Department of Consumer Affairs of the City of New York (Tr1182).

Sometime in 1970, after the denial of Yellow Bird's license application, Joseph Gambino spoke with Peter Darminio of the Terminal firm and inquired as to whether he (Darminio) would be interested in purchasing the stops that Yellow Bird had hoped to serve had its license request been approved. An understanding was reached between Gambino and Peter Darminio whereby Gambino was to receive 1/3 of the income from these purchased stops and Darminio would receive 2/3 of the income (Tr119).

Thereafter, in April, 1971, a contract (Government Exhibit 7) was entered into between Yellow Bird and Terminal which provided that Terminal would purchase the stops that Yellow Bird was successful in soliciting but could not service because it was unsuccessful in obtaining the carting license. This agreement provided that Terminal would purchase Yellow Bird's stops primarily in Co-op City in the Bronx, including the Co-op Supermarket. In addition to two initial down payments, Peter Darminio was to make monthly payments for the purchase of these stops from Gambino of approximately \$800 per month to

pay off the notes between Terminal and Yellow Bird. The balance of the 1/3 payment was to be paid to Gambino in cash (Tr127). Initially, these payments were made directly by Peter Darminio to Joseph Gambino. However, after the stops had been sold to Terminal, Carlo Conti, formerly President of Yellow Bird, became an employee of Terminal and often collected the payment owed by Peter Darminio to Gambino.

Peter Darminio was in fact a gambler and in the early 1970s was arrested on narcotics charges and was subsequently indicted in Rockland County in the State of New York. His brother, Anthony, an admitted heroin user, had in fact been tried and convicted for the sale of narcotics and was incarcerated for almost a year until the government "assisted" in arranging his work release prior to the commencement of this trial, despite the fact that he was facing a potential life sentence in jail.

As a result of the Darminio brothers' "extra curricular activities" they were constantly short of money and made it a regular habit of not being able to meet their business or personal obligations, including the payment of salaries and taxes. Between them, the Darminios borrowed a considerable amount of money from Gambino during the years 1970 and 1971. As a matter of fact, in 1971, in order to repay these outstanding loans, Terminal Sanitation sold one of its stops and the Darminios' loans to Gambino were repaid from the proceeds of the sale (Tr192). Thus, the funds advanced by Gambino to the Darminios in 1970 and 1971 were repaid to Mr. Gambino *without* any interest charged by Mr. Gambino. However, during the period 1972 through 1975, Peter Darminio was again frequently in arrears in connection with the payments of various and numerous debts; including the one-third payments that were due and owing Gambino on the former Yellow Bird stops.

In early 1972, Gambino formed the Blue Grass Carting Company and on February 26, 1972 entered into a contract to

purchase from Terminal, the Co-op City stops, including the Co-op Supermarket (Tr170). These stops included most of the stops set forth in the April 1971 contract between Terminal and Yellow Bird. In connection with this Terminal-Blue Grass contract, Gambino gave Peter Darminio a deposit in the form of a check for \$7,000. When Gambino was unable to obtain a carting license from the City of New York the agreement was cancelled and the deposit returned to Gambino. This was accepted as a working arrangement within the waste removal industry.

However, as had been the case in the past, Peter Darminio continued to require monies to cover his expenses, both personal and business, and in August or September 1972 borrowed certain additional monies from Gambino (Tr214).

In April 1973 another contract was entered into by Terminal, this time with Country Club Carting, a newly formed company which was to be operated by Gambino's wife, Rosalie, and her father, Nicholas R. Lentini (Tr170). A \$12,000 deposit was given and the defense offered testimony by both Nicholas Lentini and his wife, Angela, that they supplied \$10,000 of this \$12,000 deposit out of a Dreyfus Fund in order to form and operate Country Club Carting (Tr2509). However the City of New York again refused to issue the appropriate license and the contract was cancelled.

In July of 1973, Bernard Ettinger, who had sold Terminal to the Darminios in 1968 and who had not been paid in full in connection with the sale, made a complaint in writing (Government Exhibit 17) to the New York City Department of Consumer Affairs requesting that the Department see to it that the Darminios fulfilled their contractual obligations to him before the Department approved any sale of stops registered to Terminal (Tr1215). As a matter of fact, Mr. Ettinger had had trouble receiving the monies owed to him by the Darminios ever since 1971, which was two years prior to his complaint (Tr1213).

Thereafter, Carlo Conti allegedly visited Ettinger's office in the Bronx, slapped Ettinger and proceeded to tell him that it would be better not to complain to the Department of Consumer Affairs (Tr1219) which he did not do (Tr1220). There was no evidence offered to show that Conti did this to gain any advantage. The various benefits provided by Gambino and Conti to the Darminios were entirely inconsistent with the government's theory and remain unexplained to this day.

In 1974, there came a time when Ettinger pressed Peter Darminio for payment which was due on the 1968 sale by Ettinger to the Darminios. According to Ettinger's testimony, the balance then due was approximately \$90,000 (Tr1223-1224). Shortly thereafter, Peter Darminio came to Ettinger's office along with Joseph Perillo, owner of Du-Rite Sanitation (at one time known as Perillo Sanitation), who was prepared to purchase some stops from Terminal. Gambino was also present at this meeting.

The stops Perillo was to purchase were not in Co-op City but in the Castle Hill Avenue area of the Bronx (Tr1696). During the course of this meeting, Gambino indicated that if Ettinger would take less (money) there would be enough stops for Peter Darminio to continue to "make a living" (Tr1226). Mr. Ettinger agreed to settle for \$40,000 but insisted on a down payment that day because he had not received money. Perillo, however, did not have any money with him so Gambino thereupon gave Perillo \$5,000, which Perillo in turn gave to Ettinger. Perillo paid Gambino back a short time later, within three or four days (Tr1710). At no time during this meeting did Joseph Gambino ever threaten anyone (Tr1226).

During the remainder of the years 1974-5, Terminal's business continued to decline. In November of 1975, a contract was entered into between Terminal and P & S Sanitation, a newly formed corporation (Tr172). Pursuant to this contract of November 1975, P & S acquired Terminal's Co-op City stops,

servicing the same Co-op City stops which Terminal had previously serviced, including Harry's Service Station, located at 1000 Baychester Avenue, Bronx, New York.

REASONS FOR GRANTING THE WRIT

I.

The government failed to prove a conspiracy as to Count 1 or a violation of 18 U.S.C. §1962(b) under Count 2.

The first count of the indictment herein charged the petitioners with conspiring to violate 18 U.S.C. §§894, 1951, 1962(b) and 1962(c). It is petitioners' position that the evidence adduced by the government at trial fell far short of the requisite proof needed to show beyond a reasonable doubt that a conspiracy existed. Chronologically, the earliest alleged act of the petitioners was Conti's supposed assault on Louis Mongelli in 1969. Even if we assume that Conti did in fact assault Mongelli (although Mongelli himself testified that Conti did *not* assault him), unquestionably there was no evidence linking Gambino to this alleged assault. The final act in this drama was the American Automated incident of December 1976, in which the court found Gambino was not involved whether as a principal or as an aider and abettor and therefore not guilty. Thus we are faced with a situation wherein although a conspiracy conviction has been found, one of the two alleged co-conspirators was not involved either at the beginning of the crucial series of events or at the end.

The critical testimony on the part of the government came from the Darminio brothers, Peter and Anthony. However, it must be pointed out that the court hesitated to credit the testimony of the Darminios without corroboration by one Ralph Torres, a former employee of Terminal Sanitation (Tr2922). In fact, without Torres, the government did not have a case. At the time of sentencing, Judge Ward found that:

"Mr. Torres' testimony corroborated the testimony of the Darminios. I would suggest that without corroboration I was not prepared to believe the oral testimony of both of the Darminios as proving the government's case beyond reasonable doubt." (Tr3066).

The Darminios were certainly not pillars of society. Peter Darminio admitted to not filing business tax returns for three years (Tr299, 304) and continually took money from Terminal to support his gambling habit and high standard of living (Tr384, 405, 513). Anthony Darminio admitted to a serious heroin habit (Tr321). Furthermore both brothers conceded that they constantly lied to each other (Tr322, 1083, 1084).

Against this background the government asked the court below to find a conspiracy between Conti and Gambino. Much of the testimony concerned Hobbs Act and Anti-Racketeering Act violations as well as the conspiracy. Significantly, however, there was little direct testimony linking Gambino to any conspiracy.² The government's theory was that while Conti was the "enforcer" in the operation, Gambino was the "power" behind the whole operation. There was, we submit, no direct testimony as to this, and the circumstantial evidence of Gambino's involvement in any conspiracy was weak at best.

Initially, it was the government's obligation to demonstrate that an agreement had been reached between Gambino and Conti. *United States v. Silva*, 131 F.2d 247 (2nd Cir. 1942). This was an essential element of the government's case. *United States v. Armone*, 363 F.2d 385 (2nd Cir. 1966), *cert. denied*, 385 U.S. 957, 87 S. Ct. 391, 392, 398, 17 L. Ed. 2d 303 (three cases). The evidence showed that Gambino did not participate in any violence or threats. The Co-op City stops were his throughout

2. Obviously, if Gambino were not a member of a conspiracy, Count 1 would, of necessity, fail.

this period of time. Even the Darminios admitted this (Tr445, 465, 563). Thus there could be no conspiracy to violate 18 U.S.C. §1951 as the Darminios could not be extorted if Gambino already owned the property.³ Similarly if the stops which P & S Sanitation eventually serviced in 1975 in Co-op City always belonged to Gambino, the petitioner could not be guilty of conspiring to acquire the enterprise through racketeering activities (18 U.S.C. §1962(b)). If the evidence failed to show that a conspiracy existed to maintain Terminal through racketeering activities and to use extortionate means, no conviction under 18 U.S.C. §371 could be sustained.

If we accept the testimony in a light most favorable to the government, very little evidence directly involves Gambino. With one exception, no physical violence was perpetrated by Gambino. As will be shown, this one incident is not enough to convict him of participation in the conspiracy.

Even if we assume that Conti performed the acts of violence testified to by the Darminios, this does not show an agreement between Conti and Gambino for criminal purposes. Gambino's knowledge of Conti's actions would not create a conspiracy. Neither association with conspirators nor knowledge that something illegal is going to constitute proof of participation in a conspiracy. *United States v. Webb*, 359 F.2d 558 (6th Cir. 1966), *cert. denied*, 385 U.S. 824, 87 S. Ct. 55, 17 L. Ed. 2d 61; *United States v. Keach*, 480 F.2d 1274 (10th Cir. 1973). Although circumstantial evidence may be sufficient to show a conspiracy, it must be such as would establish *beyond a reasonable doubt* that Gambino agreed to or participated in a plan to violate the law. *United States v. Webb*, *supra*.

The record clearly indicates that Conti was a man of the streets not schooled in the subtleties of business. He struggled to

3. The issue of alleged Hobbs Act violations will be a separate point *infra*.

survive in a hard and demanding business, and perhaps, at times reacted violently. Yet this attitude cannot be said to spill over to Gambino. In dealing with the Co-op City stops or in the repayment of loans, any alleged violence did not stem with Gambino. Nor did the government show any agreement with Conti or instructions to Conti that he should employ violence.

The one incident of violence attributed to Gambino was an isolated incident of alleged assault upon Peter Darminio. In the case of *United States v. Amato*, 495 F.2d 545 (5th Cir. 1974), the conviction of one defendant, Brunello, was reversed. There the court found that although Brunello was "an active aggressor" in an assault, this lone incident was insufficient to prove his entry into or participation in a conspiracy. We believe that to this juncture the government had failed to prove the existence of a conspiracy. A more detailed analysis of the separate allegations of Count 1 show that there was unquestionably no conspiracy.

In essence Count 1 was broken down into four parts:

(a) the acquisition and maintenance, through a pattern of racketeering activity, of an interest in and control of Terminal Sanitation;

(b) the acquisition and maintenance, through a pattern of racketeering activity, of an interest in and control of the business assets and contractual rights of Terminal;

(c) the acquisition and maintenance, through a pattern of racketeering activity, of control of refuse removal in the Co-op City area and other areas of the Bronx; and

(d) the conduct and participation in the affairs of P & S Sanitation through a pattern of racketeering activity.

(a) The proof at trial failed to show a conspiracy between the petitioners for the purposes enumerated above. Even

accepting the government's proof in its most favorable light to the government, there was no proof that Gambino and Conti conspired to acquire and maintain an interest in and control of Terminal. In fact the petitioners' conduct and actions were in no way referable to a design or plan to secure any interest in Terminal's business other than the receipt of funds for those stops which the Darminios conceded never belonged to them or Terminal. At best the government's proof showed that from 1971 through 1975 Terminal had been servicing certain accounts transferred to it by Yellow Bird, retaining 2/3 of the proceeds of those accounts and remitting 1/3 to the transferors. This activity was not proven to be criminal nor part of any conspiracy to violate any federal law. There was nothing inherently or factually illegal for the petitioners to have obtained their legal share of business referred to Terminal and the law has yet to brand unlawful the receipt of a percentage of business referred to another, particularly when the recipients of the funds are in fact the owners of the income-producing property.

(b) There was a total and obvious failure to prove that through a pattern of racketeering activity, as defined by the statute, the petitioners acquired and maintained an interest in and control of the business assets and contractual rights of Terminal. Again, as in (a) above, the petitioners' conduct and actions at best evidenced a connection with those accounts which had been transferred to Terminal in a legal transaction which did not in any way affect the other stops previously held or acquired by Terminal. The proof showed unequivocally that Conti was interested only in receipts from those stops transferred to Terminal when Yellow Bird failed to acquire its own license. Further, Conti would segregate and hold only those remittances which applied to those transferred accounts and in no way did he appropriate any funds which emanated from other businesses held or maintained by Terminal.

(c) As to the third facet of this alleged conspiracy, there was again a total failure of proof that there was any conspiracy to

control refuse removal not only in Co-op City, but, as the indictment charges, in "other areas" of the Bronx. Here the government failed to produce any proof save the 1969 Mongelli incident, which could by any stretch of the imagination be construed as a design to keep others out of Co-op City. Co-op City was built at or about that time and as the testimony clearly showed at the trial, private sanitation men gravitated to specific areas, mainly for economic and efficiency reasons, and not one witness was placed on the stand who told the court that they had attempted to work Co-op City and were forced out by the defendants because of a design to maintain control of that area. Similarly there was no proof that the petitioners had a plan to control the garbage removal outside of Co-op City.

(d) Finally, there is a blatant failure of proof that the defendants conducted and participated in the business of P & S through a pattern of racketeering activity. P & S did not come into being until late 1975 and the government produced not one iota of proof that the petitioners operated that enterprise through activities which the statute brands as a pattern of racketeering activity. Significantly there was no proof that any force or violence was employed in P & S requiring the Co-op City stops from Terminal.

The common thread in the four instances cited above is the pattern of racketeering activity. Under the definition provided by statute (*i.e.*, two acts within ten years which violate specified sections of federal criminal law), the government was obliged to prove that the conspiracy either envisioned the performance of certain specified acts or did, in fact, bring to fruition the violation outlined by the statute. We submit the government's proof totally failed to show that there was any nexus between certain isolated acts and a conspiracy to achieve the purposes that the indictment ascribes to those acts.

Count 2 separately states the charge in the first two sections of the conspiracy count as a substantive act, namely the

acquisition and maintenance, through a pattern of racketeering activity, of an interest in and control of Terminal and its business assets and contractual rights, including acquisition of an interest in and control of "all customers for whom Terminal Sanitation had performed garbage collection services." Again we submit the proof failed to show any acquisition and maintenance of an interest in and control of Terminal other than the petitioners' own legal interest in the accounts which it had transferred to Terminal pursuant to written contract. There was a total failure of proof to show any connection with customers other than those specifically transferred stops. Certainly the government did not even attempt to show any interference by the petitioners with "all customers" of Terminal, and thus Count 2 similarly must fail.

II.

The government failed to establish an essential element of the Hobbs Act to permit a conviction under Count 3.

The petitioners' convictions under Count 3 of the indictment must be reversed. Count 3 charged that Conti and Gambino, in violation of 18 U.S.C. §1951, from March 1, 1972 to December 1975:

"did obtain monthly payments of money from Peter Darminio, Anthony Darminio and Terminal Sanitation. . . ."

It was further alleged that this violation was achieved "by means of extortion." Under the Hobbs Act:

"(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by the wrongful use of actual or threatened force, violence or fear, or under color of official right."

According to the initial agreement between Yellow Bird Carting and Terminal Sanitation, Gambino was to receive 1/3 of the gross monthly receipts from the collection of the old Yellow Bird stops. At no time did the Darminios consider these stops to be theirs. Rather, they both testified that the stops at all times belonged to Gambino (Tr445, 456, 563). In order for the court below to have found the petitioners guilty under Count 3, the extortion and *each of its elements* had to be proved. *Stirone v. United States*, 361 U.S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960); *United States v. Provenzano*, 334 F.2d 678 (3rd Cir. 1964), *cert. denied*, 379 U.S. 947, 85 S. Ct. 440, 13 L. Ed. 2d 544; *United States v. Nadaline*, 471 F.2d 340 (5th Cir. 1973), *cert. denied*, 411 U.S. 951, 93 S. Ct. 1924, 36 L. Ed. 2d 414.

The government's case significantly failed to prove the extortion element. How can a person violate the Hobbs Act in demanding the payment of money which rightfully belongs to him? Obviously he cannot. Nor could Conti be convicted under 18 U.S.C. §1951 for acting on behalf of Gambino to obtain the latter's money and/or property. The government failed to prove that the petitioners forced the Darminios or Terminal to part with their property. Thus Count 3 must fail. *United States v. Nakadalski*, 481 F.2d 289 (3rd Cir. 1973), *cert. denied*, 414 U.S. 819, 94 S. Ct. 42, 38 L. Ed. 2d 51. Extortion has not been extended to include the obtaining of one's own property. Extortion requires an intent to obtain that which in justice and equity the party is not entitled to receive and does not extend to the use of force to obtain that to which a person is legally entitled. *United States v. Enmons*, 410 U.S. 396, 93 S. Ct. 1007, 35 L. Ed. 2d 379 (1973).

Furthermore, the government did not prove that the petitioners' collection of sums of money from Peter Darminio had a causal effect on the interstate commerce which Terminal was engaged in. The proof at trial clearly showed that Peter and Anthony Darminio were heavily in debt to others besides Gambino and that the brothers voluntarily elected to sell stops

in order to keep themselves going. Peter Darminio's outrageous lifestyle and Anthony Darminio's hunger for drugs were the motivating factors in their repeated trips to the loan sharks. There was not one word of testimony in the record that either petitioner told the Darminios that they would have to sell or dispose of any stops to pay the alleged indebtedness to Gambino. On the contrary, the \$90,000 loan, bounced checks to Conti, dishonored notes to Yellow Bird were not the subject of any threats and the Darminios so conceded. Assuming, *arguendo*, that Gambino wished to be paid the monies he had loaned to Darminio, a violation of the Hobbs Act is not spelled out in that it was the Darminios' choice to sell assets to pay their indebtednesses rather than the petitioners' insistence that they do so. Thus, the petitioners' conviction as to Count 3 must be reversed.

III.

The evidence was insufficient to warrant a conviction under Count 4.

With respect to Count 4 (18 U.S.C. §894) it is obvious that the petitioners have suffered because of the total intermingling of facts and circumstances surrounding various borrowings by the Darminios. Petitioners concede the statute is violated when one uses force or violence in an effort to collect an extension of credit. However, we submit that the proof on this count was insufficient to persuade the trier of the fact that in fact it was the petitioners' actions *vis a vis* the Darminios, which could be pinned to the use of violence to collect extensions of credit. In other words the testimony as to beatings and threats given by the Darminios standing alone obviously would not make out a case against the petitioners since the Darminios, especially Peter, were the subject of constant manhunts by those to whom money was owed.

One specific instance was the breaking of Peter Darminio's

arm by a loan shark not connected in any way with the petitioners. A second incident was the conceded retreat to the subways seeking refuge from persons unconnected with the petitioners. The logical corroboration here was Ralph Torres, and in that regard we submit that the court erred in crediting the testimony of Torres for the specific acts which he recounted under oath. Torres, we submit, was and could not be in a position to supply the factual basis between what may have occurred during the long relationship between all the parties and the specific prohibitions enunciated in §894. We are not saying that Torres did not observe altercations between the petitioners and Peter Darminio, but we submit that Torres was in no position to know what these altercations concerned and thus the court had no basis to cross the reasonable doubt line in using Torres as a corroborator of the clearly discredited Darminios.

For example both Peter and Anthony Darminio testified that each lied to the other. The government then produced Torres to testify as to what the Darminios told him were the circumstances surrounding certain specific acts. Why did the Darminio brothers tell Torres the truth when they lied to each other? It was clear that Torres had a bias and deep-seated hostility toward the petitioners because of this notion that the petitioners would secure payments before he would get paid for his labor. It is clear that the Darminios were "bad-mouthing" the defendants as an excuse for not paying Torres while they used his money to either gamble or buy drugs. This obvious hostility, we submit, was ignored by the court in crediting Torres' testimony. Furthermore, the court closed its eyes to the long-standing, often volatile, relationship between the petitioners and the Darminios. If Gambino was the usurious extortionist the government contended he was, why did he loan Peter \$90,000 interest free? Why did he come to the aid of Anthony when Ettinger was about to foreclose on his house?

These are issues obviously resolved against the petitioners, but which we maintain should have been resolved in their favor.

Many people often have violent relationships with one another although those relationships are not necessarily criminal. Taking the entire scope of the relationships between the petitioners and the Darminios, we submit that there was a failure of proof that the petitioners acted toward their alleged victims with criminal intent. We submit we have the classic example of a Hatfield-McCoy relationship, where the government has succeeded in turning one side of the feud against the other and convincing a trier of the fact that there was *mens rea* on one side, but yet not on the other. We submit that the Court should vacate the finding of guilt and enter an acquittal on this count.

In addition, there was no testimony that the alleged beatings were as a result of Peter Darminio's failure to satisfy credit obligations. They could have been for any number of things. This was particularly underscored by the volatile and often contradictory relationship between the Darminios and the defendants.

IV.

There was insufficient corroboration of the Darminios' testimony to sustain convictions as to Counts 1-4.

On at least two occasions Judge Ward commented that the testimony of the Darminios, standing alone, would have been insufficient to sustain petitioners' convictions on Counts 1-4 (Tr2922, 3066). Thus he was required to base the convictions of assertedly corroborative testimony as he found to be contained in the testimony of Ralph Torres and in Government Exhibit 12, an alleged list of Peter Darminio's obligations to Joseph Gambino partially in Gambino's handwriting. We submit that even accepting this evidence as true, it was insufficient to corroborate the Darminios' testimony and result in proof beyond a reasonable doubt.

Without Ralph Torres, the government simply had no case against the petitioners. Judge Ward so determined both during the trial and at the time of sentencing. As to Joseph Gambino, Torres was unable to hear the conversations of Peter Darminio and Joseph Gambino, and so stated on several occasions (Tr607, 608, 611, 612). He never saw Peter give Gambino or Conti any money (Tr857) and never saw Darminio slapped by Gambino (Tr905). Although he recounted several assaults and/or threats by Conti, it was never clear that these related to any charges in the indictment, particularly in view of the fact that Torres, as had all other witnesses, testified that the Co-op City stops were neither Terminal's nor the Darminios' but rather belonged to Gambino (Tr622, 732). In fact, Torres admitted that even Conti was aware of the distinction between the original Terminal stops and the former Yellow Bird customers (Tr636) to such an extent that he would only take the checks from the Yellow Bird stops, leaving Terminal's alone (Tr734-735).

Torres admitted on several occasions that other people, besides Conti, were always looking for Peter Darminio (Tr765). The reason for this was Darminio's constant debts and his repeated failure to pay (Tr915). Although Darminio's arm was broken by a creditor, Torres admitted that neither Gambino nor Conti were involved (Tr915) and that Darminio was hiding from everyone (Tr915).

Unquestionably Torres did not corroborate the Darminios as to the charges alleged in the indictment. There was no showing of a conspiracy between Conti and Gambino. Furthermore, the only property which Torres could say Conti ever evinced an interest in was the old Yellow Bird route in Co-op City which, he confirmed, never belonged to Terminal or the Darminios. Thus his testimony was of no aid to the government on Count 2 or Count 3 (Ricco or Hobbs Acts). As to any corroboration on the §894 charge (Count 4), Torres' testimony fails to reveal if the alleged payments to the appellants by Peter Darminio were for extensions of credit or as the 1/3 monthly

use payment on the Yellow Bird stops. Without more it would be difficult to say that Torres corroborated the violations of the law as charged in the indictment, and certainly did not aid in proving the government's case beyond a reasonable doubt.

CONCLUSION

For the reasons stated above, it is prayed that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit herein.

Respectfully submitted,

s/ Roy Raymond John Kulcsar

SAXE, BACON & BOLAN,
P.C.

Attorneys for Petitioners

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APPENDIX

OPINION OF THE COURT OF APPEALS DATED
NOVEMBER 21, 1977
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 294, 348—September Term, 1977.

(Argued October 27, 1977 Decided November 21, 1977.)

Docket Nos. 77-1336, 77-1337

UNITED STATES OF AMERICA,

Appellee,

v.

JOSEPH GAMBINO and CARLO CONTI,

Defendants-Appellants.

Before:

FRIENDLY, GURFEIN and MESKILL,

Circuit Judges.

Appeal from a judgment entered by the District Court for the Southern District of New York (Ward, D.J.) sitting without a jury, convicting both defendants of conspiracy, racketeering, obstruction of commerce, and extortionate collection of extension of credit, and one defendant of income tax evasion.

The Court of Appeals held: (1) sufficient evidence was introduced to prove that defendants conspired to control a private sanitation industry in the Bronx, and extorted payments from the owners of a private sanitation firm; and (2) there was a sufficient interstate involvement to sustain defendants' convictions under the Hobbs Act.

Opinion of the Court of Appeals Dated November 21, 1977

ROY M. COHN and MICHAEL ROSEN, New York, N.Y. (Saxe, Bacon & Bolan, P.C., and Ronald F. Poepplein, New York, N.Y., of counsel), *for Defendants-Appellants*.

PETER D. SUDLER, Assistant U.S. Attorney, New York, N.Y. (Robert B. Fiske, Jr., United States Attorney, and Jacob Laufer and Audrey Strauss, Assistant United States Attorneys, New York, N.Y., of counsel), *for Appellee*.

GURFEIN, *Circuit Judge*:

The appellants were convicted of conspiracy,¹ violation of the Anti-Racketeering Act, 18 U.S.C. § 1962(b),² violation of the Consumer Credit Protection Act, 18 U.S.C. § 894,³ and violation of the Hobbs Act, 18 U.S.C. § 1951.⁴

¹ Count One of a 22 count indictment charged Gambino and Conti with conspiring to acquire and to maintain control of the private sanitation industry in certain parts of the Bronx through a pattern of racketeering activity in violation of 18 U.S.C. § 371, which provides in part:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both."

² 18 U.S.C. § 1962(b) provides:

"It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce."

³ 18 U.S.C. § 894 provides in part:

"(a) Whoever knowingly participates in any way, or conspires to do so, in the use of any extortionate means

"(1) to collect or attempt to collect any extension of credit, or

(Footnote 4 appears on p. 475)

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Gambino was found guilty also of tax evasion for the years 1970-1973 and 1975.⁵

The appellants contend that there was insufficient evidence to prove a conspiracy to acquire and maintain control of the private sanitation industry in the Coop City area of the Bronx through a pattern of racketeering activity. They argue that there was insufficient evidence to warrant a conviction under Count Four, which charged that Gambino and Conti used threats and violence in order to collect an extension of credit from Peter Darminio. Specifically, they point to an alleged lack of corroboration of Darminio's testimony.

The general outline of the case indicates that Gambino and Conti had controlled certain stops for private garbage collection in the Bronx but were unable to get a carting license from the City. They arranged for Terminal Sanitation, a licensed private sanitation firm, owned by Peter and Anthony Darminio, to collect at all of the stops which

"(2) to punish any person for the nonrepayment thereof, shall be fined not more than \$10,000 or imprisoned not more than 20 years, or both."

⁴ 18 U.S.C. § 1951 provides, in part that

"(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than \$20,000 or imprisoned not more than twenty years, or both."

⁵ Gambino was convicted of evading his federal income tax for the years 1970 through 1973 and 1975 in violation of 26 U.S.C. § 7201, which provides:

"Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than \$10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

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Gambino had previously acquired in the Bronx. The Darminios were required to kick back to Gambino one-third of all the moneys they received from servicing the stops.

Judge Ward, sitting without a jury, found that Gambino and Conti maintained control of garbage collection in Coop City and other areas of the Bronx by threatening to kill competitors and by administering beatings. This activity included an assault on an undercover agent of the FBI who was posing as a cart man and who had solicited a stop in Coop City. Judge Ward also found that Gambino engaged in extensive loansharking activities, lending a total of \$90,000 to Peter and Anthony Darminio in 1970 and 1971 and \$75,000 to Peter in 1972. These loans were collected by Gambino and Conti through the use of threats and violence.

The court carefully reviewed the evidence. Ralph Torres, an employee of Gambino and Conti, was found to be a credible witness by Judge Ward. Although the credibility of Peter Darminio was in question, his testimony concerning the defendant's extortionate extensions of credit was corroborated by an exhibit in evidence bearing Gambino's handwriting, headed with the word "Peter" and containing a column of figures and certain calculations. Judge Ward further found that Conti, who was collecting the payments, threatened and beat Darminio from time to time when he was late in making payments.

In July of 1973 one Bernard Ettinger, who had sold Terminal to the Darminios in 1968 and who had not been paid in full in connection with the sale, complained in writing to the New York City Department of Consumer Affairs, requesting that the department see to it that the Darminios fulfilled their obligations to him before the department approved any sale of stops registered to Terminal. Shortly thereafter, Conti visited Ettinger at his office,

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slapped Mr. Ettinger on the face, and told him that he had better not complain to the department.

On an earlier occasion when Ettinger had threatened to foreclose on Anthony Darminio's home, on which he held a mortgage, Mr. and Mrs. Darminio had asked Mr. Gambino for assistance, and Gambino replied "Don't worry about it. I'll send Carlo Conti to straighten it out." In 1974, Ettinger pressed Darminio for payment, which was then a balance of \$90,000. A meeting was arranged. Gambino came with Darminio. Gambino said that if Ettinger would settle, Darminio could sell some stops and there would be some stops left over so that Peter Darminio could continue his route. Ettinger agreed to settle for \$40,000. One Joseph Perillo, who was also present at the meeting, indicated that he was prepared to purchase some stops from Terminal but did not have money with him for a down payment. Gambino gave Perillo \$5,000, which Perillo, in turn, gave to Ettinger. The court found Ettinger to be a highly credible witness.

In November 1975, Terminal entered into a contract with P & S Sanitation, a newly organized company, to take over Terminal's stops. The court found that Gambino was active in P & S.

In the Fall of 1976, the FBI incorporated American Automated Refuse & Waste Removal, Inc., and set up an office in the Bronx. They bought trucks and a winch, the winch being shipped from Texas, and arranged to dump the garbage in New Jersey. They then began soliciting garbage collection accounts, including Harry's Service Station which they knew was being serviced by P & S Sanitation. On December 1, 1976, Harry's entered into an agreement with American Automated, the Government company. American Automated arranged to drop off a container at Harry's to store garbage which would be collected by Automated. Shortly thereafter, Conti

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telephoned American Automated and came to the office. He threatened to kill the person seated at the desk, who called himself Wayne Dacon but who was in fact an agent of the FBI named Walter Wayne Orrell. Conti's statement to Orrell included a threat to throw the agent out of the window. This conversation was tape-recorded and the tape was received in evidence. Conti indicated that anything new that opened up in Coop City was his. There were two places on the tape where a crunching sound was audible. Agent Orrell testified that Conti punched him. The evidence established that Conti acted frequently at the behest of Gambino, that both men conspired to acquire and maintain control of the private sanitation industry in Coop City and other areas of the Bronx through a pattern of racketeering activity and that they in fact carried out the purpose of the conspiracy, that both men obstructed commerce by extorting payments from Terminal Sanitation and its principals, and that Conti attempted to obstruct commerce by assaulting and threatening to kill persons associated with American Automated, Inc.

These findings of the experienced trial judge cannot lightly be set aside. Nor do we see any reason for so doing. We hold that there was sufficient evidence to sustain the convictions on the counts upon which Conti was convicted.

The claim that there was insufficient evidence to sustain the conviction on Count Four which charged the use of extortionate means to collect the \$75,000 loan to Peter Darminio must be rejected. There can be no doubt that Section 894 is violated when force and violence are used to collect an extension of credit. *United States v. Natale*, 526 F.2d 1160, 1165 (1975), *cert. denied*, 425 U.S. 950 (1976). When Peter Darminio was slow in making payments, he was threatened and beaten by Conti on sev-

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eral occasions and was struck and threatened on one occasion by Gambino himself. Anthony corroborated Peter Darminio's testimony about the beatings, and Torres also corroborated the testimony, having witnessed some of the beatings by Conti.

The defendants contend that their convictions under Count Three for violation of the Hobbs Act cannot stand because the payments of money which they allegedly extorted from Terminal Sanitation were a property right belonging to Gambino who, according to the Government's theory, always owned the Coop City route. Defendants contend that one cannot extort what is rightfully his. The answers are several: First, this argument was never made below, and it has therefore been waived for purposes of appellate review. *United States v. Indiviglio*, 352 F.2d 276 (1965) (en banc), *cert. denied*, 383 U.S. 907 (1966). The reason this argument was not raised below is obviously that Gambino and Conti would be in a better position with regard to the tax counts if they never owned the Coop City stops after they transferred them to Terminal. Secondly, what the Darminios were required to pay was not one-third of the proceeds they actually received from their customers, for when their customers were late in payment, the Darminios were nevertheless compelled to pay the one-third to Gambino and Conti. The Darminios had a right to solicit the stops without paying for the right. *United States v. Tropiano*, 418 F.2d 1069, 1076 (2d Cir. 1969), *cert. denied*, 397 U.S. 1021 (1970). The method of enforcing appellant's claim to control "their" stops is evidenced by the assault upon Mongelli who solicited an account in Coop City, and was beaten on the head with a metal object by Conti to discourage his initiative. The law does not favor beatings as a means of controlling markets.

The argument that there was only a casual effect on interstate commerce and that this vitiates the Hobbs Act

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conviction is unsound. The statute itself says that interference or attempted interference with interstate commerce "in any way or degree" is prohibited even if the effect is only minimal. See *Tropiano*, *supra*, 418 F.2d at 1076; *United States v. Augello*, 451 F.2d 1167, 1169-70 (2d Cir. 1971), *cert. denied*, 405 U.S. 1070 (1972). As we said in *Augello*, *supra*, 451 F.2d at 1169-70:

"Given the sweeping power of Congress under the commerce clause, *Katzenbach v. McClung*, 379 U.S. 294, 305, 85 S. Ct. 377, 13 L. Ed. 2d 290 (1964), particularly evident in the Hobbs Act, *Stirone v. United States*, 361 U.S. 212, 215 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960), it is enough that the extortion 'in any way or degree,' 18 U.S.C. § 1951(a), affects commerce, though its effect be merely potential or subtle [citing cases]."

The next point raised by appellants is that the Government contrived to create federal jurisdiction when it formed American Automated for the purpose of trapping the suspected racketeers. They rely, of course, on *United States v. Archer*, 486 F.2d 670, 683 (2d Cir. 1973), in which the court spoke of a "federally provoked incident of local corruption." The *Archer* case is clearly distinguishable. There specific phone calls were purposely made in order to create an interstate element for what would otherwise have been merely a local crime. In the original opinion, 486 F.2d at 678 and in the opinion denying the Government's petition for rehearing in *Archer*, we specifically declined to decide whether the court could or should dismiss the prosecution as an abuse of federal power. 486 F.2d at 684. We based our decision on the insufficiency of uncontrived use of interstate and foreign facilities. Here, on the contrary, the activities of American Automated were necessarily wedded to interstate commerce. It obtained equip-

Order of the Court of Appeals Dated January 27, 1978

ment from Texas and it legitimately arranged to dump its garbage in New Jersey where the rates were cheaper. No one asked Conti to threaten the FBI agent or to hit him on the head; Conti could have acquiesced in allowing American Automated to take the Harry's Service Station account. There is no entrapment in such a situation, any more than the flashing of a roll of bills on a public street is the entrapment of an alert robber.

Moreover, *Tropiano* established that the garbage collection business in a town in Connecticut was sufficiently related to interstate commerce to support a Hobbs Act violation. Since the garbage collection business in the Bronx was sufficiently related to interstate commerce in like manner, it was really unnecessary for the federal agents actually to buy machinery or to dump garbage outside the state. The ruse itself was not objectionable, and the allegedly spurious out-of-state involvement was in any event, irrelevant.

The last point raised is that Conti should not have been convicted of attempted extortion under Count Five because the American Automated employee, being an FBI agent, really could not be put in fear. The short answer is that Conti was not convicted of a completed extortion, but only of an attempted extortion. We do not have to determine whether the agent can be put in fear sufficiently to make out the crime of extortion. To prove attempted extortion, it is necessary to prove only an attempt to instill fear. *Carbo v. United States*, 314 F.2d 718, 740-41 (9th Cir.), *cert. denied*, 377 U.S. 953 (1963). That the victim may be made of unusually stern stuff or that he may, in fact, be a federal agent is quite irrelevant to a permissible finding that there has been an attempt to instill fear.

The judgment of conviction of each appellant is affirmed in all respects.

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**ORDER OF THE COURT OF APPEALS DATED
JANUARY 27, 1978**

UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-seventh day of January, one thousand nine hundred and seventy-eight.

Present:

HON. HENRY J. FRIENDLY

HON. MURRAY I. GURFEIN

HON. THOMAS J. MESKILL

Circuit Judges.

FILED JAN. 27, 1978

A. Daniel Fusaro, Clerk

United States of America,

Plaintiff-Appellee,

v.

77-1336

77-1337

Joseph Gambino, Carlo Conti,

Defendants-Appellants.

11a

A petition for a rehearing having been filed herein by counsel for the defendant-appellant, Joseph Gambino,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

s/ A. Daniel Fusaro

A. Daniel Fusaro

Clerk